

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 657 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE N.G.NANDI
and
Hon'ble MR.JUSTICE D.P.BUCH

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

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ABDUL GANI ABDUL KARIM ALIAS BACHUBHAI PATNI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 657 of 2002
Mr Nigam Shukla for Mr D D Nanavati for Petitioner No. 1
Mr K C Shah, APP for Respondent No. 1
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CORAM : MR.JUSTICE N.G.NANDI
and
MR.JUSTICE D.P.BUCH

Date of decision: 02/09/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE N.G.NANDI)

Heard. Admit. Mr K C Shah, learned APP waives service and accepts the notice of admission.

2. On the request by the learned Advocate for the appellant-convict and learned APP for the State, this appeal is taken up today itself for final disposal as the only contention pressed by the learned Advocate for the appellant-convict is the quantum of sentence in view of the amendment in section 41 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the NDPS Act'). We, therefore, take up this appeal for final hearing and disposal.

3. The facts leading to the prosecution case shortly stated is that during the night intervening 19th July and 20th July, 1999 between 1.15 a.m. and 2.10 a.m., near village Gadu, in Mangrol Taluka, near Chorwad, District Junagadh, two persons - Noor Ahmed Shaikh and Sabbir Hussein Miya were searched and from their possession, charas was found/recovered and they confessed that they had purchased the charas from the present appellant-convict Abdul Gani Abdul Karim alias Bachu Patni of Veraval. Thereafter, the said Noor Ahmed Shaikh and Sabbir Hussein Miya were taken to Chorwad police station; that they were kept there and thereafter telephonic information was sent to Veraval police station about the aforesaid information received and subsequent thereto, a raid was arranged in presence of the Panchas by the police staff at the house of Abdul Gani Abdul Karim at about 4.45 a.m. There the present appellant was found and the house was searched in his presence. During the search from the first room of his house, charas was found weighing 80 grams valuing Rs.2,800/-. Thereafter, the muddamal charas was divided into two equal parts and put in the plastic bag separately and slip containing signatures of the Panchas was put in the bag as well as on the outer side of the bag and seal of the City Police Station Officer, Veraval was applied. That, a cash amount of Rs. 1095/- was also found which was also recovered vide panchnama which was drawn between 4.45 a.m. and 6.30 a.m. The appellant Abdul Gani Abdul Karim was arrested and complaint for offence punishable under section 8 and 20 of the NDPS Act was filed. On completion of investigation, charge-sheet was filed against the appellant. Thereafter, the case was committed to the Sessions Court at Veraval. The Sessions Court, vide Exh. 8, framed charge against the appellant on 20th July, 1999. The accused denied the charge and claimed to be tried. The prosecution adduced oral as

well as documentary evidence to bring home the guilt to the accused and thereafter statement of the accused under section 313 of the Criminal Procedure Code was recorded. On appreciation of oral as well as documentary evidence, the appellant was found guilty for the offence punishable under section 8(c) and 20(b)(ii) of the NDPS Act and was sentenced to undergo Rigorous imprisonment for a period of 10 years and was directed to pay a fine of Rupees one lakh and in default to suffer two years simple imprisonment. It is this finding of guilt/conviction and sentence which have been assailed in the memo of the appeal by the appellant-convict.

4. Since the appellant has not challenged the finding of guilt/conviction recorded by the trial court and the appeal is confined only to the sentence in view of section 41 (new) of the NDPS Act, we do not think it necessary to call for the Record and Proceedings of the case and therefore, the Record and Proceedings of the case have not been called for.

5. At the outset, it is submitted by Mr Nigam Shukla, learned Advocate appearing for the appellant-convict that the finding of guilt/conviction arrived at and recorded by the trial court is not challenged in the present appeal and the present appeal is confined only to the sentence imposed by the trial court for offence punishable under Section 8(c), 20(b)(ii) of the NDPS Act. It is further submitted by Mr Nigam Shukla that in view of the amendment in section 41 of the NDPS Act and looking to the quantity of 80 grams of charas recovered from the appellant-convict, the sentence would be maximum six months or fine or with both, and that the maximum fine would be Rs. 10,000/only. It is further contended that 80 grams of charas would be a small quantity within the meaning of the amendment in section 41 read with section 20 of the act.

Mr K C Shah, learned APP does not dispute that in view of the amendment in section 41 read with section 20 of the NDPS Act, the quantity (80 grams charas) would be a small quantity. As per Item No.23 of the Schedule of the NDPS Act, small quantity would be upto 100 grams and in the instant case, the quantity recovered from the appellant is 80 grams.

6. The Parliament has enacted the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001. Section 41 sub-section (i) of the Amended Act reads as under:

"41.(i) Notwithstanding anything contained in sub-section (2) of section 1, all cases pending before the courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence:

Provided that nothing in this section shall apply to cases pending in Appeal."

7. The Ministry of Finance (Department of Revenue) has issued Notification dated September 27, 2001 in exercise of the powers conferred by sub-section (2) of Section 1 of the ND & PS (Amendment) Act, 2001 appointing October 2, 2001 as the date on which the said Act has come into force in the whole of India. In the present case, the trial against the appellant had concluded on November 5, 2001 but before that date the Amending Act had come into force and therefore in view of the provisions of Section 41 of the Amending Act, there is no manner of doubt that the case of the appellant ought to have been disposed of in accordance with the provisions of the Principal Act as amended by the Amending Act and the question of punishment ought to have been considered in the light of provisions of the Amending Act. Section 21 after the new Amendment is as under:

"21. Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug shall be punishable -

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extent to ten thousand rupees, or with both;

(b) where the contravention involves

quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.

provided that the court may, for reasons

To be recorded in the judgment,
impose a fine exceeding two lakh rupees."

In exercise of the powers conferred by the Clauses (viia) and (xxiia) of Section 2 of the NDPS Act, 1985 and in supersession of Ministry of Finance, Department of Revenue Notification S.O. 527(E) dated 16th July, 1996, the Central Government has, by a Notification S.O. 1055(E) dated October 19, 2001, specified the quantity mentioned in columns 5 and 6 of the Table prescribed below it, in relation to the narcotic drug or psychotropic substance mentioned in the corresponding entry in columns 2 to 4 of the said Table, as the small quantity and commercial quantity respectively for the purpose of the said clauses of that Section. As per the table, so far as Heroin is concerned, the small quantity specified is 5 grams whereas commercial quantity specified is 250 grams. There is no manner of doubt that what was found from the possession of the appellant was 154.6 grams of Brown Sugar and the contravention involves quantity, lesser than commercial quantity but greater than small quantity. Therefore, the rigorous imprisonment could have extended to 10 years and with fine which could have extended to Rs. 1 lac. The learned Judge has proceeded on the footing that the provisions of unamended Principal Act are applicable to the facts of the present case.

8. The above being the position of law pursuant to the amendment in Section 41 read with section 20 of the Act, 80 grams charas recovered from the possession of the

appellant-convict would be, in view of Item No. 23 of the TABLE appended to the NDPS Act, a small quantity and the sentence which would be attracted would be maximum of six months' rigorous imprisonment or with fine upto Rs.10,000/- or both. It is submitted by Mr Nigam Shukla, learned Advocate for the appellant that the appellant is in jail since the date of offence (20.7.1999) i.e. for more than three years, and remand to the trial court on the point of sentence would delay the matter and hence this Court should decide the appeal on sentence. We, therefore, do not remand the case to the trial court on the point of sentence as the appellant is in jail for more than six months.

9. In view of the above, the conviction recorded against the appellant-convict is required to be confirmed and looking to the amendment in section 41 read with section 20 of the said Act as pointed out above, the sentence imposed on the appellant-convict is required to be reduced along with the fine.

10. In view of the above, the conviction recorded by the trial court against the appellant-convict Abdul Gani Abdul Karim @ Bachubhai Patni, at present serving out sentence in Sabarmati Central Jail, Ahmedabad is confirmed. The sentence of 10 years rigorous imprisonment and fine of Rupees One lakh, in default, two years' Simple Imprisonment is reduced to six months' rigorous imprisonment and fine of Rs.5,000/-, in default, rigorous imprisonment for two months. The sentence imposed by the trial court is reduced and modified to the above extent.

This appeal is disposed of accordingly. If the fine is deposited as aforesaid, the accused be set at liberty forthwith, if not required in any other case. Fine, if paid in excess of whatever ordered hereinabove, shall be refunded to the appellant.

2.9.2002 [N G Nandi, J.]

[D P Buch, J.]

msp